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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA – RIVERSIDE DIVISION

In re:

JIHAD SAKER

Debtors.

GREGG ROBERTS

Plaintiff,

V.

JIHAD SAKER

Defendants.

| Adversary Case# 6:23-ap-01055-SY

Bankruptcy Case# 6:23-bk-10976-SY

Chapter 7

**MOTION TO DISMISS PLAINTIFF'S
AMENDED COMPLAINT PURSUANT
TO FRCP 12(b)(6)**

Hearing:

Judge: Hon. Scott H. Yun

Date: March 14, 2024

Time: 9:30 a.m.

Place: 3420 Twelfth St., Crtrm 302
Riverside, CA 92501

INTRODUCTION

1 Plaintiff, Gregg Roberts, the assignee of two state court judgments, filed his Amended
2 Complaint (“Complaint”) against Jihad Saker (“Defendant”) asking this Court to deny
3 Defendant, a chapter 7 discharge. Plaintiff Gregg Roberts (“Roberts”) asserts that Jihad Saker
4 (“Defendant”) should not be entitled to discharge the 2017 judgment against him for negligence.
5

6 Plaintiff makes general allegations that Defendant’s actions were willful and malicious,
7 an assertion that was not made in the state court case, lacks supporting facts and which
8 contradicts the findings of negligence claim in the state court case. Plaintiff alleges that
9 Defendant is liable for the willful or malicious acts of an agent, an assertion that contradicts
10 established law. Plaintiff asserts Defendant concealed destroyed or failed to preserve documents
11 under 11 USC §727, though neither the UST nor the Chapter 7 Trustee, after extensive
12 examination, discovered facts to support grounds for an action under §727. Finally Plaintiff
13 claims Defendant should not receive a discharge asserting that Defendant knowingly made false
14 statements, though the statements in question were either not made under oath or were made to
15 the best of Defendant’s recollection without bad faith.

16 Plaintiff’s Complaint should be dismissed with prejudice because, while the complaint in
17 its title refers to §523(a)(6) and §727, the Complaint lists no specific cause of action to which the
18 Defendants can answer and fails to establish a legal theory or facts to support his claim for non-
19 dischargeability. For these reasons, Complaint should be dismissed pursuant to Rule 12(b)(6) of
20 the Federal Rules of Civil Procedure.

I. ARGUMENTS AND AUTHORITIES

A. The Complaint Should Be Dismissed for Failure to State a Cause of Action

Under 11 USC §523(a)(6)

25 A motion to dismiss under Federal Rules of Civil Procedure 12(b)(6) tests the legal
26 sufficiency of the claims asserted in the complaint. The issue raised by a Rule 12(b)(6) motion is
27 whether the facts pleaded would, if established, support a valid claim for relief. *Storm v. United*
28

1 *States*, 641 F3d 1051, 1067 (9th Cir. 2011); *SEC v. Cross Fin'l Services, Inc.*, 908 F.Supp. 718,
2 726-727 (CD CA 1995); *Beliveau v. Caras*, 873 F.Supp. 1393, 1395 (CD CA 1995).

3 The standard for dismissal incorporates and must be viewed in light of the simplified
4 pleading standards embodied in the Federal Rules of Civil Procedure Rule 8(a). See *Swierkiewicz*
5 *v. Sorema N.A.*, 534 U.S. 506 (2002). According to Rule 8(a)(2), a complaint must set forth "a
6 short and plain statement of the claim showing that the pleader is entitled to relief." Such a
7 statement is adequate so long as it "give[s] the defendant fair notice of what the plaintiff's claim
8 is and the grounds upon which it rests." *Id.* at 512.

9 For purposes of Rule 12(b)(6), a claim means a set of facts that, if established entitle the
10 pleader to relief. *Bell Atlantic Corp. v. Twombly*, 550 US 544, 555 (2007). A Rule 12(b)(6)
11 dismissal is proper when the complaint fails to allege either: (1) a cognizable legal theory or (2)
12 absence of sufficient facts alleged under a cognizable legal theory. *Shroyer v. New Cingular*
13 *Wireless Services, Inc.*, 622 F3d 1035, 1041 (9th Cir. 2010). Moreover, to survive a motion to
14 dismiss, the facts alleged must state a facially plausible claim for relief. *Id.* at 1041.

16 Section 523(a)(6) prevents discharge "for willful and malicious injury by the debtor to
17 another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The Supreme Court
18 in *Kawaauhau v. Geiger (In re Geiger)*, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998),
19 made clear that for section 523(a)(6) to apply, the actor must intend the consequences of the act,
20 not simply the act itself. *Id.* at 60, 118 S.Ct. 974. Both willfulness and maliciousness must be
21 proven to block discharge under section 523(a)(6). *In re Ormsby*, 591 F.3d 1199, 1206 (9th Cir.
22 2010).

25 Under § 523(a)(6), the injury must be "willful," such that the debtor must have intended
26 the consequences of his action, and not just the action itself. *Kawaauhau v. Geiger*, 523 U.S. 57,
27 61 (1998). "The willful injury requirement of § 523(a)(6) is met when it is shown either that the

1 debtor had a subjective motive to inflict the injury or that the debtor believed that injury was
2 substantially certain to occur as a result of his conduct." *Petralia v. Jercich (In re Jercich)*, 238
3 F.3d 1202, 1208 (9th Cir.), cert. denied, 533 U.S. 930 (2001). Thus, negligent or reckless acts
4 which inflict consequential injury do not fall within the ambit of § 523(a)(6). *Geiger*, 523 U.S. at
5 64. *In re Thiara*, 285 B.R. 420, 427 (B.A.P. 9th Cir. 2002)

6 The Supreme Court in *Kawaauhau v. Geiger (In re Geiger)*, 523 U.S. 57, 118 S.Ct.
7 974, 140 L. Ed. 2d 90 (1998), clarified that for §523(a) (6) to apply, "the actor must intend the
8 consequences of the act, not simply the act itself." *Ormsby v. First American Title Co. of*
9 *Nevada (In re Ormsby)*, 591 F. 3d 1199, 1206 (9th Cir. 2010). Both willfulness and
10 maliciousness must be proven to prevent discharge of the debt. *Id.* But, reckless or negligent acts
11 are not sufficient to establish that a resulting injury falls within the category of willful and
12 malicious injuries under §523(a)(6). *Kawaauhau v. Geiger*, 523 U.S. at 64. *Barton v. Carthan (In*
13 *re Carthan)*, Case No.: 1:19-bk-12727-MT, at 9-10 (Bankr. C.D. Cal. Apr. 13, 2021)

14 Willful element: Willfulness means intent to cause injury. *Kawaauhau v. Geiger*, 523
15 U.S. at 61. "The injury must be deliberate or intentional, 'not merely a deliberate or intentional
16 act that leads to injury.'" *In re Plyam*, 530 B.R. 456, 463 (9th Cir. BAP 2015)
17 (quoting *Kawaauhau v. Geiger*, 523 U.S. at 61) The court may consider circumstantial evidence
18 that may establish what the debtor actually knew when conducting the injury creating action and
19 not just what the debtor admitted to knowing. *In re Ormsby*, 591 F. 3d at 1206. Recklessly
20 inflicted injuries, covering injuries from all degrees of recklessness, do not meet the willfulness
21 requirement of § 523(a)(6). *In re Plyam*, 530 B.R. at 464. Reckless conduct requires an intent to
22 act instead of an intent to cause injury. *Id.* Therefore, the willful injury requirement "... is met
23 only when the debtor has a subjective motive to inflict injury or when the debtor believes that
24 injury is substantially certain to result from his own conduct." *Carillo v. Su (In re Su)*, 290 F.3d
25 1140, 1142 (9th Cir. 2002). *Barton v. Carthan (In re Carthan)*, Case No.: 1:19-bk-12727-MT, at
26 *10 (Bankr. C.D. Cal. Apr. 13, 2021).

1 Here, the Complaint fails to state facts to support the claim under 11 §523(a)(6) of willful
2 and malicious injury by the Debtor. The Complaint establishes that on May 16, 2014, Travon
3 Stokes (“Stokes”) shot and killed decedents David Lawler, Terry Freeman, Jr., and Kavin
4 Johnson (the “Victims”) on the premises of Ahalena Hookah Lounge (the “Hookah Lounge”).
5 The Complaint establishes that Defendant is the owner of the Hookah Lounge. The Complaint
6 does not establish that Defendant took any action directly against the Victims. Indeed, the
7 Complaint fails to establish any direct link or connection between Defendant and his actions and
8 the Victims. Defendant did not act willfully or maliciously to intend the outcome of murder, and
9 there has been no evidence shown to support that from Roberts’ state court complaint or
10 Plaintiff’s Complaint in Bankruptcy Court. It is undisputed that Defendant did not pull the
11 trigger nor did he intend to cause injury to anyone.

12 Plaintiff appears to draw similarities between the injury that can arise from driving while
13 intoxicated and this case in that “operating a motor vehicle while intoxicated is a dangerous
14 activity where injury to another is highly foreseeable” In re Ray, 51 B.R.L. 236 (9th Cir. BAP
15 1985). Unlike the conduct in *Ray*, Debtor’s actions or omissions did not give rise to a
16 foreseeable injury since the actions were not inherently dangerous.

17 However, Roberts fails again to provide a legal argument under which Debtor could be
18 denied a discharge. As noted in the well settled law above, not only did Debtor need to have
19 intended his actions, but he needed to have intended the injury or the outcome. For example, it is
20 insufficient to show Debtor intended to not have a security policy, Debtor must have intended the
21 injury in this case, or that Debtor knew with substantial certainty that lack of a security policy
22 would result in injury. There is no evidence of either of these. Plaintiff makes a bold statement
23 purporting to know what Saker knew stating that “Saker knew this” but there is no evidence in
24 the State Court proceeding or the Complaint to support this statement. Without evidence,
25 Roberts concludes the mindset of the Debtor.

1 Furthermore, even if Defendant had acted recklessly, for which the Complaint fails to
2 state facts, there would still be a requirement for intention to cause the outcome of injury.
3 Plaintiff fails to state facts that Debtor had intent or motive to inflict the injury.

4 Plaintiff fails to provide a legal argument or theory to support his conclusion. Without
5 any evidence, Plaintiff concludes “The actions and/or omissions of Saker and his agent were
6 done intentionally, and injury was substantially certain” without performing any legal analysis
7 under existing law. Plaintiff’s claims are conclusionary at best and not based in law or in fact.

8 Plaintiff attempts throw whatever he can lat Defendant and asserts that Defendant’s
9 subsequent arrest for illegal gambling somehow results in Defendant having intentionally or
10 willfully caused the injury in the civil case. See Complaint page 8. Bringing in Defendant’s
11 subsequent arrest in an unrelated matter is irrelevant to this Complaint and serves only to tarnish
12 Defendant. Moreover, if there were evidence of willful or intentional malicious conduct, in the
13 wrongful death case, Defendant would have been prosecuted criminally. The lack of criminal
14 prosecution in connection with the wrongful death case shows there was insufficient evidence to
15 prove willful intent or malice.
16

17 **B. The Amended Complaint States Facts that are Insufficient to Prove Defendant
18 Concealed, Destroyed or Failed to Preserve Financial Documents Under 11 USC
19 727(a)(2)(A) and 727(a)(3).**

20 In his Complaint, Plaintiff concludes without any factual support or sworn declaration
21 that Defendant Concealed, Destroyed and failed to preserve documents. Plaintiff ignores the
22 testimony that resulted from extensive examination by the Chapter 7 Trustee, the UST, and
23 Roberts himself, at the continued Meeting of Creditors on May, 17 2023. In that meeting,
24 Debtor was questioned by all 3 of the above and the Chapter 7 trustee and the US Trustee both
25 determined that there was no evidence that Debtor concealed, destroyed or failed to preserve
26 documents. More importantly the Trustees concluded the meeting finding no evidence to hinder
27 documents. More importantly the Trustees concluded the meeting finding no evidence to hinder
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1 or delay payments to creditors. Had there been any indication that Debtor engaged in an effort to
2 conceal or destroy documents, the Chapter 7 trustee and US Trustee would have certainly
3 continued their investigation in this case.

4 The Complaint makes the same allegations in his Motion to Dismiss arguing that Debtor
5 transferred funds from his personal account at Arrowhead and from his Wells Fargo account in
6 his DBA E Street Market. E Street Market is a DBA for Jihad Saker. Therefore any transfers
7 out of E Street Market Wells Fargo account or Arrowhead to the account for Saker Enterprises,
8 Inc. shows the Debtor putting money into his business from his personal accounts in an effort to
9 save and keep his business running. Moving money from personal to a business account years
10 before contemplating bankruptcy is permissible. These facts here do not trigger an action under
11 §727.

12 Similarly, Plaintiff states that 21 payments were made from E Street Market to Debtor's
13 personal mortgage. Because E Street Market is a DBA for Jihad Saker, there are no grounds for
14 a§ 727 action since payments were made to Debtor's personal mortgage from his E Street
15 Market account. Debtor is allowed to pay his personal mortgage from his personal account.
16 Alleging that Defendant paid his mortgage from a personal account as a violation of §727 is
17 problematic. The same is true for paragraph 55, where Roberts states Debtor made 23 cash
18 withdrawals from the E street Market Account. Debtor is permitted to make withdrawals from
19 his personal account. Furthermore, Plaintiff omits that the majority of these withdrawals were
20 made nearly two years before the filing of Defendant's bankruptcy case. As explained in
21 Debtor's Opposition to Roberts' Motion to Dismiss, the cash withdrawals in question took place
22 between January 2020 and September of 2021. The only amounts withdrawn over \$3,000 at that
23 time were in March of 2021, nearly 2 years prior to Defendant's bankruptcy filing, in which
24 Debtor removed a total of \$30,000 over 3 different dates. Debtor testified at the meeting of
25 creditors that he used the funds to improve and repair his home, an allowable expense for the
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1 Debtor. These facts support Debtors position that he did not make these withdrawals in an effort
2 to hide, hinder or delay payments to creditors or made in contemplation of bankruptcy.

3 The Complaint alleges that although Roberts reported these issues to the Trustee and that
4 the Trustee never requested that Saker produce missing records. This is false. Chapter 7 Trustee
5 Arturo Cisneros requested extensive documents from Counsel, in which Counsel provided to the
6 Trustee whatever Debtor had records of and access to. Because these records go back more than
7 2 years in accounts that are now closed, Debtor is unable to access every record that Roberts
8 demanded.

9 The Complaint shows a ledger of Defendant's personal accounts and E Street Market
10 accounts, which were depleting each month, which is consistent with loss of income due to a
11 failing business, yet Roberts asserts Defendant made a false statement when he said he was
12 unable to afford to feed himself let alone pay his loans.

13 Plaintiff complains about Defendant's contempt in the state court case, but under 11 USC
14 727(a)(6) Debtor should be denied a discharge if Debtor refused in this case, to obey a lawful
15 court order. Therefore, any argument that Debtor was in contempt of state court is not grounds
16 for denial of discharge in his bankruptcy proceeding.

17 **C. Complaint Fails to Prove Defendant Knowingly Made False Statements Under
18 11 USC § 727 (a)(4)(a).**

20 Plaintiff's allegations that Defendant made false statements in his opposition to Robert's
21 Motion to Dismiss is unfounded. Debtor's opposition to Roberts motion to dismiss was not
22 accompanied by a sworn declaration. Furthermore, Plaintiff's assertion that Debtor failed to
23 disclose that E street Market was a partnership is inconsequential. To the best of Debtor's
24 recollection, he was and acted as the only owner of E Street Market. While technically Debtor
25 and his son were partners in name, the records and bank statements show all transactions were
26 between Debtor and E Street Market. Furthermore, Debtor's son, even as a business partner, is
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1 not the Debtor in this case and would not be required to attend the meeting of creditors, contrary
2 to Roberts' assertion in paragraph 87, nor is Roberts entitled to examine or question him.

3 **F. Statute of Limitations to Bring any Additional Claims against Debtor has Run**

4 Plaintiff's allegations are barred by the statute of limitations. Bankruptcy Court applies
5 state law statute of limitations. In this case, Plaintiff allegations for False statements, willful or
6 malicious conduct and concealment of assets. The CA state statute of limitations for these
7 causes of actions are 1-2 years. The judgment against Defendant for wrongful death negligence
8 was entered in 2017. If Plaintiff wanted to bring an action for willful or malicious conduct, he
9 must have done that at the time the claim was filed in state court , because the allegations in
10 question arise from the same set of facts.

11 **II. CONCLUSION**

12 For the reasons set forth above, Defendants respectfully request that the Court dismiss the
13 Complaint.

14 Dated: February 21, 2024

15 Respectfully Submitted,

16
17 /s/ Richard Sturdevant
18 Richard Sturdevant, Esq.
19 Financial Relief Law Center, APC
20 Attorneys for Defendants